No. 20843

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TITLE INSURANCE AND TRUST COMPANY, Executor of the Estate of LUDWIG G. B. ERB, Deceased,

Appellant,

vs.

THE UNITED STATES OF AMERICA.

On Appeal From United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Statement of Procedure.

The plaintiff-appellant sued in the District Court for the Southern District of California, Central Division, for the recovery of Estate Tax and interest assessed by defendant-appellee and paid under protest. Plaintiff-appellant contended that it was entitled to a deduction in the amount of certain charitable bequests to tax-exempt charitable institutions. In said action plaintiff-appellant also sought a further recovery based on the deductibility of its reasonable attorneys' fees incurred in bringing the action and presenting the preceding Claim for Refund and related matters.

On January 12, 1966, the District Court (per Honorable Harry C. Westover) awarded a Summary Judgment upon defendant-appellee's motion. Said Summary Judgment determined that appellee is not entitled to a deduction on account of the charitable bequests but pro-

vided for the retention of jurisdiction by the Court to determine the amount of any deduction for "attorneys' fees and expenses incurred in connection with contesting the deficiency assessed and prosecuting the Claim for Refund in this action, including any appeal from this Judgment, upon proof thereof to the Court" [R. 204-205].

Statement of Jurisdiction.

The basis of jurisdiction in this case is the fact that it arises under the laws of the United States. Jurisdiction and venue of the cause in the District Court were conferred by Title 28 United States Code, Sections 1346(a)(1) and 1402(a)(2) and Title 26 United States Code, Section 7422. This Court has jurisdiction to consider this appeal pursuant to Title 28 United States Code, Section 1291 because the Summary Judgment appealed from is a final decision of a United States District Court.

The pleadings and facts which disclose the basis upon which it is contended that the District Court had, and this Court has, jurisdiction are as follows: the Complaint alleges that on or about October 20, 1959, plaintiff-appellant, as Executor of the Estate of Ludwig G. B. Erb, deceased, filed a Federal Estate Tax Return (Treasury Department Form 706) with the District Director of Internal Revenue at Los Angeles, California; that the amount of estate tax reflected on the return as due was paid when said return was filed; that a deficiency of $92,669.58 was assessed against plaintiff-appellant on or about October 5, 1962 by the Internal Revenue Service; that on December 28, 1962 and February 18, 1963 said deficiency plus interest thereon was paid by plaintiff-appellant under protest;

that on or about November 12, 1963 plaintiff-appellant filed a Claim for Refund with the District Director of Internal Revenue; that on or about February 6, 1964 the Commissioner of Internal Revenue rejected said Claim for Refund in its entirety; that said District Director of Internal Revenue wrongfully has collected from plaintiff-appellant the sum of $81,742.54 plus interest thereon.

On September 2, 1965, defendant-appellee filed in the United States District Court for the Southern District of California, Central Division, its Notice of Motion and Motion for Summary Judgment. On November 8, 1965 said District Court (per Honorable Harry C. Westover) filed a Memorandum of Decision ordering judgment for defendant-appellee. On January 12, 1966 and January 13, 1966, respectively, the Summary Judgment herein appealed from was lodged, filed and entered. On February 11, 1966 appellant herein timely filed its Notice of Appeal.

Statement of the Case.

1. The Facts.

Ludwig G. B. Erb (hereinafter referred to as "Ludwig") was born on November 3, 1875. He died, a resident of Los Angeles County, California, on July 31, 1958 at the age of eighty-two years [R. 63, 196]. Ludwig had married Emma Erb (hereinafter "Emma") in 1898. They had no children. Emma followed Ludwig in death on August 31, 1962; at her death she was eighty-seven years old [R. 196-197].

Ludwig had originally been engaged in the motion picture business until his retirement in about 1927. Thereafter he managed his investments but was not otherwise actively engaged in business [R. 152].

During the latter twenty-five years of their marriage, the Erbs lived very conservative lives. Although their combined estates had a value in excess of $1,-800,000.00, they never owned a high-priced automobile and lived in a partially-furnished apartment renting for $375.00 per month. Emma continued to reside in the same apartment until her death. They seldom entertained or had visitors. They took no trips abroad during their marriage, although after Ludwig's death Emma visited Honolulu in 1959, 1960 and 1961 [R. 144-145].

Emma owned no jewelry except costume jewelry worth $20.00. She owned one fur jacket valued at $200.00. When Ludwig died his funeral, arranged by Emma, cost but $454.15 [R. 145, 199].

Under date of April 20, 1942 Ludwig, by a Declaration of Trust, created an *inter vivos* trust, No. P-10551 which named appellant Title Insurance and Trust Company (hereinafter "T.I.") as trustee [R. 64, 197].

Generally said trust provided that the income from the corpus was to be distributed to Ludwig during his lifetime, and upon his death, in the event that Emma survived him, to Emma during her lifetime. Said trust further provided that, upon the death of both Ludwig and Emma, after certain distributions of corpus, the income from the remaining corpus should be distributed to certain named individuals and, upon the death of said persons, the trust should terminate and the corpus then existing should be divided among the following named six charitable institutions: Goodwill Industries of Southern California; Hathaway Home for Children; McKinley Home for Boys; Braille Institute of America, Inc.; Salvation Army of California; and Pacific Home [R. 64, 197].

On January 8, 1947 said Declaration of Trust was amended in certain particulars not pertinent to the issues in this action [R. 65, 198].

The Declaration of Trust, in its original form contained Section Six which provided:

> "If at any time or times during the life of this Trust, the Trustor—and after his death, the said Emma Erb if she shall survive him—shall be in want of additional moneys for reasonable support, care and comfort, or for expenses of accident, illness or other misfortune, in each such case of a want, it shall be the duty of the Trustee—upon receipt by it of evidence satisfactory and conclusive of such want—to pay to, or to use, or to apply, or to expend for the said Trustor or his said wife, as the case may be, such portion or portions of the corpus of this trust estate, up to and including the whole thereof, as the Trustee may deem necessary to meet such want." [R. 64-65, 197-198].

In November, 1954, Ludwig consulted a long-time friend, Attorney Henry G. Bodkin, about the preparation of a new Will and a review of the once-amended Declaration of Trust [R. 143]. As appears in Bodkin's affidavit:

> "At that time, Mr. Erb stated to me that, although Mrs. Erb had a substantial estate of her own, he was particularly interested in being assured that she would, in the event of his death, be fully protected and assured of having sufficient funds to live out her life in the manner to which she had been accustomed.
>
> "Upon examining the Declaration of Trust and noting the language of SECTION SIX thereof

(the power of invasion clause) I recalled and recounted to Mr. Erb a prior experience of mine involving a trust in which the trustee was Title Insurance and Trust Company. As I told Mr. Erb, in that instance the Title Company had refused to consider legal expenses of a trust beneficiary, incurred in successfully obtaining her restoration to competency and termination of guardianship as necessities which it could pay with trust funds. I told Mr. Erb that Title Insurance like most corporate trustees, was a very conservative trustee and that in order to be certain that Mrs. Erb would be assured of sufficient money to live in her accustomed manner, perhaps some revision of ARTICLE SIX of the Trust should be considered. Mr. Erb stated that he did not want Mrs. Erb to be in a position to use money from the Trust for frivolous purposes but did want to be certain that the trustee would have ample power to see that her reasonable wants and needs were provided.

"I also expressed my concern to Mr. Erb that, in view of the language of SECTION SIX, as it then existed, the trustee's right or power to invade the corpus was dependent upon the trustee's having received 'evidence satisfactory and conclusive of (Emma's) such want.' Upon my advice, the elimination of this phrase was authorized by Mr. Erb.

. . .

"While discussing Mr. Erb's Will, I recommended that, in order to obtain the benefit of the marital deduction, his Trust be amended and his Will drawn so that Mrs. Erb would receive half of the estate outright or at least a power of appointment over one-half of the Trust corpus.

I further recommended to him that as to the remaining half of the Trust corpus, Mrs. Erb have the income for life, but no power of appointment. Mr. Erb declined to accept my advice in these respects, and thereby substantially reduce the taxes payable upon his death. He stated that he simply wanted to be sure that his wife was adequately provided for after his death and that the charities likewise received their allotted shares of the trust estate. He therefore did not authorize the revision of the Trust and drafting of a Will as would give Mrs. Erb a power of appointment over any part of his estate or Trust." [R. 143-145].

Bodkin thereafter prepared a further amendment to said Declaration of Trust which was executed on January 4, 1955, and which modified the language of Section Six in certain respects to read as follows:

"If at any time or times during the life of this trust, the Trustor—and after his death, the said EMMA ERB, if she shall survive him—shall be in want of additional moneys for reasonable support, care and comfort, or for expenses of accident, illness or other misfortune, or for any purpose whatsoever, whether included in the foregoing classification or not; in such case of want or need it shall be the duty of the Trustee, in its sole uncontrolled discretion, to pay to or to use or to apply or to expend for the said Trustor or EMMA ERB, his said wife, as the case may be, such portion or portions of the corpus of this trust estate, up to and including the whole thereof, as the Trustee may deem necessary to meet such want." [R. 65-66, 198].

After Ludwig discussed the amendment with H. L. Sheldon, T. I.'s Trust Officer in charge of Trust P-10551, Ludwig and officers of T. I. executed the said amendment on January 4, 1955. Sheldon averred in his affidavit as follows:

> "I discussed with Mr. Erb and his attorney, Henry G. Bodkin, the reasons for the changes in the language of said SECTION SIX of said Trust instrument at or about the time of the making of said amendment.
>
> "Based upon my understanding and interpretation of said SECTION SIX, as amended, and of Mr. Erb's intentions which prompted the amendment, I would not have invaded the corpus of said trust for the benefit of Mrs. Erb unless said invasion was reasonably necessary to permit Mrs. Erb to live in the manner to which she had been accustomed prior to Mr. Erb's death and then, only if Mrs. Erb did not have sufficient funds available from other sources to pay the costs of supporting and maintaining her in such manner.
>
> "As said SECTION SIX was understood by me, as the Officer in charge of said Trust, invasion of corpus was not intended to be authorized for any purpose other than such reasonable expenses as might be incurred in permitting Mrs. Erb to be supported, maintained, cared for and enjoy such comforts as she had during the lifetime of Mr. Erb." [R. 150-151].

A few days before the Trust was amended, on December 28, 1954, Ludwig executed his last Will. This testament, admitted to probate, named T. I. as Executor and

gave the residue of Ludwig's estate to T. I. to be held as a part of said Trust No. P-10551 [R. 66, 199].

At the time of his death on July 31, 1958, Ludwig's gross estate totalled $995,851.17 [R. 199]. The decree of final distribution transferred the residue of the estate, valued at $705,201.77 to T. I. as trustee of Trust No. P-10551 on January 29, 1960 [R. 199].

On January 4, 1955, the date of the above amendment to Section Six, Emma's life expectancy was 9.6 years. On July 31, 1958, the date of Ludwig's death, Emma's life expectancy based on mortality tables, was 8.3 years [R. 145, 199].

Emma died August 31, 1962, owning an estate worth $920,350.76, no part of which had been included in Ludwig's estate [R. 98]. During the balance of Emma's life after Ludwig's death she enjoyed a substantial income from her own estate. Her separate income plus that which she received by way of income from Trust No. P-10551 is reflected below [R. 148, 199].

	Emma's Private Income	Income from Trust No. P-10551	Emma's Total Income
1959	26,190.87	1,755.07	27,945.94
1960	27,927.57	32,338.95	60,266.52
1961	31,944.56	22,001.89	53,946.45
1962*	35,080.95	1,471.73	37,552.66

During said interval between Ludwig's death and Emma's death, Emma's bank accounts increased by

*Eight months only — January 1 to August 31, 1962.

$36,464.91, she acquired federal, state and local bonds totalling $55,000 and she invested $25,042.73 in trust deed notes. It is thus apparent, that out of a gross income of $205,666.36 (less state and federal income taxes of $68,120.80) she saved or invested $116,507.64 and expended the balance of $81,037.58 for other purposes, including living expenses [R. 199].

Based upon the Trustee's understanding and interpretation of said Section Six, as amended, and of Ludwig's intentions which prompted the amendment, the trustee would not have invaded the corpus of said trust for the benefit of Emma unless said invasion was reasonably necessary to permit Emma to live in the manner to which she had been accustomed to prior to Ludwig's death and then, only if Emma did not have sufficient funds available from other sources to pay the costs of supporting and maintaining her in such manner [R. 151].

At no time after Ludwig's death was the corpus of said Trust No. P-10551 ever invaded [R. 147, 200]. The entire principal of the trust will go to the above named charities as remaindermen.

2. The Pleadings, Other Papers and Stipulations Upon Which the Court Granted the Summary Judgment.

The Motion for Summary Judgment was filed pursuant to Rule 56 of the Federal Rules of Civil Procedure and local Rule 3(d) (2) of the District Court. The appellee's moving papers consisted of the Notice of Motion [R. 77], the pleadings, *i.e.*, the Complaint [R. 2] and Answer [R. 45] and the Pre-trial Stipulation of

Facts Agreed Upon [R. 63]. In reply, appellant submitted the affidavits of the following persons: Henry G. Bodkin, attorney for the decedent who drafted the language here in question [R. 143]; W. E. Bell, Trust Officer of appellant [R. 147]; John D. Moore, decedent's public accountant who prepared income tax returns for decedent and his widow [R. 148]; H. L. Sheldon, retired Trust Officer of appellant [R. 150]; Douglas Travers, close friend and one time business associate of decedent [R. 152]; Winifred Larsen, decedent's landlord at his place of residence [R. 154]. Also submitted by appellant was a second affidavit of Henry G. Bodkin [R. 156].

All of the averments of said affidavits were uncontradicted and the appellee expressly conceded the truth of their contents [Rep. Tr. p. 6]. By virtue of the government's failure to controvert said affidavits the Trial Court concluded that no issues of fact remained and that it could properly dispose of the matter on a Motion for Summary Judgment [Rep. Tr. p. 7].

ARGUMENT.

The United States District Court Erred in Granting Defendant-Appellee's Motion for Summary Judgment and in Ordering That the Executor of Decedent's Estate Was Not Entitled to Recover Any Federal Estate Tax Upon Its Claim of Deduction for Charitable Bequests Under Section 2055 of the Internal Revenue Code of 1954 (26 United States Code Section 2055).

The sole issue before this court is whether the District Court erred in granting the government's Motion for Summary Judgment in an action by the Executor of the Estate of Ludwig G. B. Erb, Deceased, to recover Federal estate taxes which said Executor alleges were erroneously and illegally collected. The question before the District Court was whether the value of the remainder interest of certain charities under an *inter vivos* trust created by decedent, which trust was the residuary beneficiary under decedent's Will, was an allowable deduction under Section 2055 of the Internal Revenue Code of 1954 (26 U.S.C. §2055).

The District Court recognized that there were two aspects to this question [Rep. Tr. p. 10]. And although the lower Court used different language to formulate those aspects, they may be more specifically stated as: (1) whether the *inter vivos* trust created by Ludwig provides a sufficiently definite standard limiting the extent of possible invasion for the benefit of Emma so that the value of the charitable remainders were "presently ascertainable" at the time of Ludwig's death; and (2) whether the possibility that the charities would not take was so remote as to be negligible.

The District Court found that the interest claimed by the Executor to have been transferred by Ludwig's Will

to the six charitable institutions specified as remaindermen of the *inter vivos* trust was not ascertainable by the terms of the trust as of Ludwig's death, that the inclusion in Section Six of the Declaration of Trust, as amended, of the language "or for any purpose whatsoever, whether included within the foregoing classification [*i.e.*, the classification of reasonable support, care and comfort, expenses of accident, illness, or other misfortune] or not" made the trustee's power of invasion of corpus so broad that there was no standard of invasion capable of measurement in monetary terms, and that by reason of the failure to provide a readily ascertainable and reliably predictable standard by which the extent of the trustee's power to invade corpus for the benefit of Emma could be determined, it could not be said that the possibility that the charitable transfers would not become effective was so remote as to be negligible. While it does not appear that the determination of whether the possibility that the charities would not take was so remote as to be negligible is to be reached by answering whether there was a standard of invasion "presently ascertainable" at the time of Ludwig's death, it is upon that initial question of whether there was an ascertainable standard of invasion that the District Court erred. The second question of remoteness was not answered by the District Court; and since the government has conceded all the facts set forth by the appellant as being true, there seems little doubt that the second question, if properly considered, would have been answered in the taxpayer's favor.

I.

Legislative and Judicial Background.

A. The Statute and Regulations.

The instant case is governed by Section 2055 of the *Internal Revenue Code* of 1954, 26 U.S.C.A. §2055, which provides in part:

> "(a) IN GENERAL.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers. . . .
>
> * * *
>
> "(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes."

Section 2055 of the 1954 Code is essentially similar to Section 812(d) of the 1939 Code under which many of the cases involving the general issue found in the present case have been decided.

Treasury Regulations on Estate Tax (1954 Code), Section 20.2055-2, entitled "Transfers not Exclusively for Charitable Purposes", outlines the requirements of the Treasury for such a deduction. The provisions material to this case read as follows:

> "(a) *Remainders and Similar Interests.* If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest.

"(b) *Transfers subject to a Condition or a Power.* If, as of the date of a decedent's death, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of a decedent's death and the estate or interest would be defeated by the performance of some act or the happening of some event, the occurrence of which appeared to have been highly improbable at the time of the decedent's death, the deduction is allowable. If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, the deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of the power. . . ."

B. Supreme Court Decisions.

Three United States Supreme Court decisions have treated factual situations somewhat similar to those in the instant case. The first decision was in *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929). In the words of the court, at page 154 of *Ithaca:*

"On June 15, 1921, Edwin C. Stewart died, appointing his wife and the Ithaca Trust Company executors and the Ithaca Trust Company trustee

of the trusts created by his will. He gave the residue of his estate to his wife for life with authority to use from the principal any sum, 'that may be necessary to suitably maintain her in as much comfort as she now enjoys.' After the death of the wife there were bequests in trust for admitted charities. The case presents two questions, the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under § 403-(a)(3), supra, in order to ascertain the estate tax, cannot be allowed. Humes v. United States, 276 U.S. 487, 494, 72 L. ed. 667, 670, 48 Sup. Ct. Rep. 347. This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. *The standard was fixed in fact and capable of being stated in definite terms of money.* It was not left to the widow's discretion. The income of the estate at the death of the testator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. *There was no uncertainty appreciably greater than the general uncertainty that attends human affairs.*" (Emphasis added.)

In 1943 the Supreme Court decided against the taxpayer on the question of an allowable charitable deduction for the remainder interest in a trust in *Merchants National Bank v. Commissioner,* 320 U.S. 256. In that case, the court wrote, at page 261:

"Decedent's will permitted invasion of the corpus of the trust for 'the comfort, support, mainte-

nance and/or *happiness* of my wife.' It enjoined the trustee to be *liberal* in the matter, and to consider her 'welfare, comfort and happiness *prior* to the claims of residuary beneficiaries,' i.e., the charities.

"Under this will the extent to which the principal might be used was not restricted by a fixed standard based on the widow's prior way of life. Compare Ithaca Trust Co. v. United States, 279. U.S. 151, 73 L. ed. 647, 49 S. Ct. 291. Here, for example, her 'happiness' was among the factors to be considered by the trustee." (Emphasis added.)

At page 262, the Court explained the reason for its decision:

"The salient fact is that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction. This is not a 'standard fixed in fact and capable of being stated in definite terms of money.' Cf. Ithaca Trust Co. v. U.S., 279 U.S. 151, 73 L. ed. 647, 49 S. Ct. 291, supra. *Introducing the element of the widow's happiness and instructing the trustee to exercise its discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to be overcome,* notwithstanding the widow's previous mode of life was modest and her own resources substantial. We conclude that the commissioner properly disallowed the deduction for estate tax purposes." (Emphasis added).

The most recent Supreme Court decision in this area was in 1949 in *Henslee v. Union Planters National Bank,* 335 U.S. 595. In *Henslee* the will provided:

> "I hereby direct both my executors and my trustees to pay to my mother the sum of Seven Hundred Fifty ($750.00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of the property, real or personal, for this purpose.
>
> "In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the *pleasure, comfort and welfare* of my mother.
>
> "The *first object to be accomplished* in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose." (Emphasis added).

The court in *Henslee* felt that the facts required a disallowance of the claimed deduction as in *Merchants* because the will did not limit the trustee's right to invade corpus ". . . to conformity with some ready standard—as where, for example, trustees are to provide the prime beneficiary with such sums 'as may be neces-

sary to suitable maintain her in as much comfort as she now enjoys.' " (The pertinent language of *Ithaca.*)

The court in *Henslee* went on to state, at page 598:

> "The stated income here directed to be paid to the mother was 'to be used by her as she sees fit.' Beyond this the trustees were empowered to invade or wholly utilize the corpus of the estate for the mother's 'pleasure, comfort and welfare,' bearing in mind the testator's injunction that 'The first object to be accomplished . . . is to take care of and provide for my mother in such manner as she may desire. . . .' As in the *Merchants Bank Case,* where the trustees had discretion to disburse sums for the 'comfort, support, maintenance and/or happiness' of the prime beneficiary, so here we think it the 'salient fact . . . that the purposes for which the widow could, and might wish to have the funds spent to not lend themselves to reliable prediction.' "

The court will note that the ranks of Justices Douglas and Jackson, who dissented in *Merchants,* were joined in *Henslee* by Justice Frankfurter.

It would appear that the factual distinction among the three cases cited is the interjection in both *Merchants* and *Henslee* of the subjective element of the life beneficiary's "happiness", and the injunction to the trustee in *Merchants* to be liberal in considering such "happiness" and, in *Henslee,* the forthright declaration that the testator's first objective was his mother's support and *happiness* to which the rights of the charitable remaindermen were necessarily subordi-

nate. Commenting upon this latter provision, the *Henslee* court stated at footnote 3, page 599:

> "In view of the *express priority* accorded the mother's wishes, respondents' *fiduciary duty* to the ultimate beneficiaries, private and charitable, was ineffective to guarantee preservation of any predictable fraction of the corpus for disposition after the mother's death. The testator, indeed, made the gifts to charity subordinate not only to his mother's interest, but to that of all the private beneficiaries, stating in his will that charitable interest 'is a residuary bequest . . . and is not to infringe of any of the other legacies hereinbefore provided.' " (Emphasis added.)

The court was obviously impressed by the limitation, in *Ithaca,* of benefits payable out of corpus to those necessary to maintain his mother in her accustomed prior way of life. In *Merchants* the court recognized the advisability of looking to Massachusetts law to see if it was restrictive of the power to invade where an express limitation did not appear. The court expressed doubt that Massachusetts law would be sufficiently restrictive to overcome the absence of a reliable standard it had determined resulted from the language of the will.

C. Ninth Circuit Decisions.

The appellee and the court below dismiss somewhat peremptorily the cases of the Ninth Circuit Court which support appellant's position and are contrary to that urged by appellee. In *Commissioner v. Bank of America,* 133 F. 2d 753, the invasion clause read:

> ". . . by reason of accident, illness, *or other unusual circumstances* so require, such additional sum

or sums as in the judgment of said trustee may be necessary and reasonable under the existing conditions." (Emphasis added.)

The court therein stated, at page 754:

"The taxing statute permits the deduction from gross estate of charitable bequests of the kind made here. The Commissioner argues that where, as here, the bequest is subject to an intervening life estate, the existence of the legal power to invade the corpus, or *the mere possibility of invasion, is sufficient to defeat the deduction.* The Board, however, was of the opinion that on the facts of the case the probability of the trustee's delving into corpus, or even into surplus income, was so inconsiderable as to render the value of the charitable bequests capable of definite ascertainment."

* * *

"The case of Ithaca Trust Company v. United States, 279 U.S. 151, 49 S. Ct. 291, 73 L. Ed. 647, is more nearly akin to the present. There the wife was given the whole of the income for life, with authority on the part of the trustee to use from the principal any sum necessary to suitably maintain the wife 'in as much comfort as she now enjoys.' The court thought the standard was sufficiently fixed and capable of being stated in definite terms of money, and that 'there was no uncertainty appreciably greater than the general uncertainty that attends human affairs.'

"*The case before us exhibits no greater uncertainty.* At the decedent's death the life expectancy of the sister was brief. Her mode of living and the restricted sphere of her activities were known.

> She had independent means, modest in amount, it is true, but substantial for one in her situation. Her living expenses were well within the monthly sum allowed her, even if her own resources be disregarded; and the fixed annuity in turn was so substantially less than the net income of the trust that an excess fund of almost $7,000 accumulated in the four years ending with 1940. Large sums were thus available to meet unusual circumstances such as illness or accident, so that the probability of an invasion of the corpus was remote indeed. *Nothing was left to the sister's discretion; and the discretion of the trustee to meet the designated contingencies was confined to the expenditure of what was reasonably necessary.*" (Emphasis added.)

Compare the presence of the adjective "reasonable" and the adverb "necessary" in Section Six of the Erb trust.

Another Ninth Circuit case is *Commissioner v. Wells Fargo Bank,* 145 F. 2d 130, wherein there was involved a power to invade corpus to assist testator's niece in case of her need "on account of any sickness, accident, want or other emergency." This phrase would seem broader than that in the Erb trust since it provides for invasion for purposes other than "sickness, accident (or) want." Nevertheless in this case the court affirmed a Tax Court decision allowing a deduction for a charitable remainder bequest.

Among the court's comments are the following, at page 131:

> "According to the findings of the Tax Court, decedent's niece was at one time employed as a

saleslady, receiving a maximum of $175 per month. In 1918 she became decedent's companion at a salary of $45 per week. She retained the position until decedent's death. At that time the niece was 54 years of age and possessed independent means valued at approximately $35,000. The appraised value of decedent's residuary estate at the date of her death was $130,000. From the date of its distribution to them on August 18, 1941, until the niece's death on June 22, 1942, the testamentary trustees paid the niece as life beneficiary $300 a month out of the income of the trust. The annual net income of the trust was $4,000, and undistributed income was held by the trustees for the life beneficiary. With the income from her own securities the income of the trust was more than sufficient for her ordinary needs.

"The Tax Court adopted the theory that 'where the possibility of the invasion of the trust principal out of which the charitable bequest is made is so remote as not seriously to affect the ascertainment of the value of the bequest and where, *on the known facts,* the value can be ascertained with reasonable accuracy, the test for the deduction as laid down by the Supreme Court has been met.' It then found 'the likelihood that there would ever be any invasion of the trust corpus * * * so remote as not seriously to detract from the value of the charitable bequest' and held the charitable gift herein within the deductions authorized by 26 U.S.C.A. Int. Rev. Code, §812(d)." (Emphasis added.)

The court followed the Supreme Court decision in *Ithaca* and its own early decision in *Bank of America,* both *supra,* and easily distinguished the then recent Supreme Court decision in *Merchants* as follows, at page 132:

> "In the instant case there is substantial evidence to support the finding of the Tax Court concerning the remoteness of invasion of the trust corpus. The taxpayer has shown with *sufficient certainty* that the entire amount of the principal will be available for charitable purposes in accordance with the directions in the will by a showing of the beneficiary's advanced age, frugality over a long period of time, and independent means. The Merchants National Bank case, supra, is clearly distinguishable on its facts. The opinion therein emphasizes the possibility under the will of draining corpus for the widow's happiness through the trustee's exercise of 'discretion with liberality,' a highly speculative element, which is absent in the instant situation. We therefore find no error." (Emphasis added.)

In the present case it not only can be shown with "sufficient certainty" that the charitable remainder will not be depleted or entirely defeated, but also the power to invade no longer exists. *There has been no invasion of corpus and it is an absolute certainty that the charities will receive their allotted remainder shares.*

II.

State Law Rules of Construction.

In the light of the reasoning of the United States Supreme Court and the Ninth Circuit Court of Appeals in the decisions mentioned above, we may turn to the language of Ludwig Erb's trust and consider its meaning as required under the rules of law in the State of California. Section Six (as amended in 1955), which provides the trustee with a limited power of invasion, reads:

> "If at any time or times during the life of this trust, the Trustor—and after his death, the said EMMA ERB, if she shall survive him—shall be in want of additional moneys for reasonable support, care and comfort, or for expenses of accident, illness or other misfortune, or for any purpose whatsoever, whether included in the foregoing classification or not; in such case of want or need, it shall be the duty of the Trustee, in its sole uncontrolled discretion, to pay to or to use or to apply or to expend for the said Trustor or EMMA ERB, his said wife, as the case may be, such portion or portions of the corpus of this trust estate, up to and including the whole thereof, as the Trustee may deem necessary to meet such want."

California Civil Code, Section 1638, requires that the "language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." However, it cannot reasonably be said that the language of Section Six quoted above is clear and explicit in that an apparent ambiguity has

arisen regarding the phrase ". . . or for any purpose whatsoever, whether included in the foregoing classification or not." To the trustor, the draftsman, and the trustee—the appellant herein—this phrase clearly and explicitly refers to purposes related to "want or need" as set out in Section Six. The government and the court have interpreted the phrase to give the trustee *carte blanche* to invade the trust corpus for *any purpose*. Even if this were a "reasonable" interpretation of the trust, it becomes an absurdity in that the trustee may not, under the laws of California, so invade the corpus or principal of the trust. Therefore, the local rules of construction become applicable and necessary.

A. Document Must Be Construed as a Whole.

In California, as in most states, it is axiomatic that the instrument creating the trust must be looked to to determine the nature, extent, and object of the trust. It is mandatory that the trust be construed as a whole. As it is stated in 48 Cal. Jur. 2d 720-721, Trusts, §77, entitled "Construction as Whole":

> "In ascertaining the intention of the trustor, the court is not limited to determining what is meant by any particular phrase, but may consider the necessary implication arising from the language of the instrument as a whole. This means that the language in a particular trust declaration is to be interpreted, not as an isolated statement of intention, but in the light of the entire declaration. And a construction of a particular trust provision, though it might be justified if the provision stood alone, should be rejected if it is entirely inconsistent with the apparent purposes of the instru-

ment taken as a whole and would defeat one of the beneficent purpose of the trust. Thus, in analyzing the terms of a testamentary trust instrument, the office of the court is to ascertain the general scheme of the testator by a consideration of the instrument as a whole and to give effect to its scope and purpose as manifested by its language. And the meaning of particular words, phrases, and provisions is subordinated to the scheme, plan, or dominant purpose."

It will be noted from the moving papers filed by the United States in seeking a summary judgment and by the Findings of Fact and Conclusions of Law and Memorandum of Decision of the District Court that both the government and the District Court have singled out the phrase ". . . or for any purpose whatsoever, whether included in the foregoing classification or not"; and each respectively based its entire argument or its decision on the contention that said phrase gives the trustee *carte blanche* to invade the trust corpus for any purpose. Such is clearly not the case.

First of all, in reading the original trust instrument and the amendments thereto, this court will find no indication that the rights of the charitable remaindermen were subordinate to the rights of Emma as life beneficiary. There is no declaration to the trustee that Ludwig's first objective was his wife's support and happiness. Nowhere in the trust is there a direction that the trustee's power of invasion is to be measured by any subjective standard relating to Emma. Nowhere in the trust is there the usual provision that the trustor is to exercise its discretionary power of invasion with liberality.

Far from it. It is quite apparent that the trust had both a private and a charitable purpose. The private purpose was to provide Emma a life income of $20,000.00 to $30,000.00 (to supplement her own income of thirty thousand dollars or so) and to provide a safeguard in case of misfortune by supplying the trustee with a discretionary power to invade the principal in times of need or want. The charitable purpose was to preserve the corpus of the trust intact for distribution to six specified institutions except in the event that the income was insufficient to maintain Emma in her normal standard of living, which was indeed modest.

The trustor's intent in creating this trust was obviously twofold. The government cannot in good conscience contend that Ludwig subordinated the interests of the six charitable remaindermen to the life tenant when in fact he refused to obtain the tax benefits of the marital deduction because this would require giving Emma a testamentary power of appointment over one-half of the trust corpus. As the result of Ludwig's decision to insure that the charities received the corpus by his not taking advantage of the marital deduction, the net estate tax calculated and paid by the Executor was $144,964.73 (prior to any assessments). The trustor clearly intended to guarantee that the charities would receive the entire principal of the trust corpus unless the income therefrom was unable to provide Emma funds to maintain her standard of living, a possibility so remote as to be negligible.

Further, it is conceded that the trustee would not have invaded the corpus of said trust for the benefit of Emma unless said invasion was reasonably necessary to permit Emma to live in the manner to which she had

been accustomed prior to Ludwig's death and then, only if Emma did not have sufficient funds available from other sources to pay the costs of supporting and maintaining her in such manner [R. 151; Rep. Tr. p. 6]. The trustee's said interpretation is required by California law.

Although, as the court observed in *Merchants National Bank,* various local laws of other states may not restrict a trustee having discretion to invade a corpus by reading into the trust the requirement that the invasion be only to support the life beneficiary in her accustomed manner, there is no doubt that this restriction is imposed upon the trustee by California law.

In *Estate of Ferrall,* 41 Cal. 2d 166, a lifetime beneficiary sued to compel the trustees to invade the corpus for her "care, needs and comforts." An order requiring such an invasion was reversed. The Will provided:

> "That if at any time the income from the corpus of the trust herein created is insufficient to meet the needs of my daughter, Faye F. Hamilton, then and in that event, in the sole discretion of the trustees herein, the trustees may pay to my said daughter, Faye F. Hamilton, such amounts from the principal or corpus of the trust sufficient to meet her needs, care and comforts . . ."

The trustees had refused to comply with a demand that they invade corpus to pay the incompetent life beneficiary's expenses in a sanitarium on the ground that beneficiary's husband had the primary obligation to support her, that the testator intended that the husband not be relieved of the responsibility during the

marriage and that he had the ability to provide for her needs.

The California Supreme Court noted, at page 176, that a trustee must consider a beneficiary's other means in determining whether to invade corpus in the absence of an affirmative expression of contrary intent in the trust instrument. The Court also approved of a comment in the Restatement of Trusts, as follows:

> "The extent of the discretion conferred upon the trustees depends primarily upon the manifestation of the intentions of the settlor . . . The mere fact that the trustee is given discretion does not authorize him to act beyond the bounds of a reasonable judgment."

See also *Coberly v. Superior Court,* 231 Cal. App. 2d 685, 687; *Di Maria v. Bank of California,* 237 Cal. App. 2d 254, 258.

The trustee of Ludwig's trust was further obligated under general trust law to deal impartially as between Emma, a life tenant, and the succeeding beneficiaries, the six charitable remaindermen. It could not invade the corpus to the detriment of the remaindermen, except to provide for Emma's reasonable wants and needs, after considering her other income and means. *Restatement of Trusts,* 2d §183 provides: "When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them." Section 232 of the same *Restatement* further states: "If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests."

B. Trustor's Intent Is Apparent From a Consideration of the Changes Effected by the 1955 Amendment.

Consideration of the changes effected by the 1955 Amendment to Ludwig's trust is a natural approach to a determination of the meaning of the amendments. As the Ninth Circuit Court recently said in *Queen Insurance Co. of America, v. United States National Bank of San Diego,* .... F. 2d .... (9th Cir., July 18, 1966):

> "Appellants contend that, for the purpose of interpreting the bonds in suit, the court may not look to and compare this clause with the substituted discovery rider for the reason that 'it was never a part of the contract.'"
>
> * * *
>
> "What could be more natural, in trying to discover what the discovery rider does, than to look at the language that it strikes? We do this every day in construing amendments to statutes. Why not also in construing contract documents?"

Said Section Six may be better understood and interpreted if the language before and after the 1955 amendment is considered. The words in the following paragraph, which are lined out are those in the original paragraph which were eliminated in 1955. The italicized words were added in 1955.

> "If at any time or times during the life of this Trust, the Trustor—and after his death, the said EMMA ERB, if she shall survive him—shall be in want of additional moneys for reasonable support, care and comfort, or for expenses of accident, illness or other misfortune, *or for any purpose whatsoever, whether included in the foregoing*

> *classification or not;* in such case of want *or need,* it shall be the duty of the Trustee, *in its sole uncontrolled discretion,* ~~upon receipt by it of evidence satisfactory and conclusive of such want~~ to pay to or to use or to apply or to expend for the said Trustor or *Emma Erb,* his wife, as the case may be, such portion or portions of the corpus of this trust estate, up to and including the whole thereof, as the Trustee may deem necessary to meet such want."

It will be noted that the phrase "or for any other purpose whatsoever, whether included in the foregoing classification or not" relates to and qualifies the previous phrase limiting the power to invade to "support, care and comfort . . . expenses of accident, illness or other misfortune" and that the phrase deemed so important by the government is inextricably tied into the previous phrase is obvious from the way the paragraph is punctuated. The vital phrase which is singled out by the government, is concluded with a semi-colon. The succeeding portion of the paragraph refers first to Emma Erb's "want or need" and later to her "need" and makes it clear that the preceding general phrase is intended to refer only to "wants" or "needs" and not to grant a power to invade for other unlimited purposes.

C. Rules for Construction of Writings Make It Clear That Trustee's Power of Invasion Was Limited to Instances Where Invasion Is "Necessary" to Meet Life Beneficiary's Wants or Needs.

The rules of interpretation of contracts must be applied to trusts. (*Ringrose v. Gleadall,* 17 Cal. App. 2d 664, 667.)

The following California Civil Code sections are applicable to assist in the interpretation of the invasion clause in the Erb Trust:

> §1637: "For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied."
>
> §1639. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title."
>
> §1641. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."
>
> §1643. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."
>
> §1647. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."
>
> §1650. "Particular clauses of a contract are subordinate to its general intent."
>
> §1652. "Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."

Defendant-appellee has convinced the lower court that the trust instrument was intended to authorize invasion

of the corpus "for any purpose whatsoever" without relation to the life beneficiary's wants, needs, supports, care or comfort. Such an interpretation is unreasonable and would make what is otherwise a clear, unambiguous instrument fraught with uncertainty.

If, as the government urges, the phrase ". . . or for any purpose whatsoever . . ." is interpreted so as to authorize invasion for *any* purpose without being limited to wants, needs, support, etc., the subsequent references to "want" and "need" would be disregarded and the clause would, in effect, be read as follows (with the stricken words disregarded):

> ". . . for reasonable support, care and comfort, or for expenses of accident, illness or other misfortune, or for any purpose whatsoever, whether included in the foregoing classification or not; ~~in such case of want or need~~ it shall be the duty of the trustee, in its sole uncontrolled discretion, to pay to or to use, or to apply for the said trustor or EMMA ERB, his said wife, as the case may be, such portion or portions of this trust estate, up to and including the whole thereof, as the trustee may deem necessary ~~to meet such want.~~"

This process would disregard the rules requiring that every provision be given some effect. (*Transportation Guarantee Company v. Jellins,* 29 Cal. 2d 242, 12 Cal. Jur. 2d 332.) It would ignore the law that particular words or phrases must be subordinated to general intent. (*Newby v. Anderson,* 36 Cal. 2d 462, 12 Cal. Jur. 2d 333). Such an interpretation would overlook the rule

requiring the meaning of a writing to be determined by a reading of the entire instrument and not by isolating one or more clauses. (*Kohn v. Kohn,* 95 Cal. App. 2d 708, 12 Cal. Jur. 2d 332.)

The court will note that, following the phrase relied upon by the appellee, which we urge is simply further descriptive of the prior references to support, etc., the trust instrument in two instances refers to "such want." When the word "such" is first used, it is the second word following the semi-colon concluding the phrase emphasized by the Government. The word "want" first appears at the commencement of the phrase including support, care, comfort, accident, illness, misfortune, "or any purpose whatsoever". Accordingly, the relative adjective "such" must refer to the entire phrase preceding the semi-colon which is then summarized by the phrase "want or need" and at the end of Section Six by the single word "want". The point is that the use of "such", "want" and "need" would be meaningless unless the trustor intended the power of invasion to be limited to supplying Emma's wants or needs and did not intend that the trustee should have *carte blanche* to invade the corpus.

> "Such: This is a relative adjective referring back to and identifying something previously spoken of. By grammatical usage it naturally refers to the last preceding antecedent. In this respect it is equivalent to "said", "aforesaid", "afore-described", and "same", as to all of which the same grammatical rule applies. That is, in the absence of some controlling reason to the contrary they refer

> to the last antecedent. When the word precedes a noun in the singular number, it partakes of the nature of a pronoun as well as that of an adjective; it properly relates to the same noun in the same number as antecedently expressed and qualified, especially to the qualification; it denotes that the noun which it precedes is to be understood as antecedently qualified." (12 Cal. Jur. 2d 359.)

The only possible antecedent of "such" is the entire phrase commencing ". . . shall be in want," and concluding ". . . whether included in the foregoing classification or not".

The general rules of construction compel the conclusion that the addition of the general phrase "or for any purpose whatsoever, whether included in the foregoing classification or not;" when read in the light of the specific items preceding it and the general overall purpose and intent of the language preceding and following it, does not have independent meaning of itself and comes within the rules of "ejusdem generis".

In *Bader v. Coale,* 48 Cal. App. 2d 276, the rule of *ejusdem generis* was stated as a rule of interpretation in which "when general words follow specific terms, the former will be strictly limited in meaning to things of like kind and nature."

The same rule was enunciated in *McFadden v. Lick Pier Co.,* 101 Cal. App. 12, at page 17:

> "It is the rule of construction that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated."

III.

Emma's Accustomed Standard of Living Constitutes an Ascertainable Standard.

Internal Revenue Bulletin 54-285 (IRB 1954-29) was rendered in response to a request for advice as to the propriety of a charitable deduction where there was a power to invade for the "comfort, support, hospital or medical expenses" of the testator's surviving wife.

The ruling stated:

> "Where the power of invasion is limited by such words as 'comfort and support' with no express standard or limitation in the will or instrument, such words should be interpreted as meaning the comfort and support according to the standard of living enjoyed by the beneficiary prior to the decedent's death, if such interpretation is consistent with applicable local law, and other terminology in the will or instrument does not require some different interpretation. (The inclusion of the words 'hospital or medical expenses' does not enlarge the power of invasion as hospital and medical care are included within the broad meaning of comfort and support.)"
>
> * * *
>
> "In view of the foregoing it is held that a charitable deduction under section 812(d) of the Internal Revenue Code may be allowed on account of bequests or gifts of remainder interests to charity in cases where the will or instrument authorizes "invasion of corpus for the comfortable maintenance and support of life beneficiaries if (1) there is an ascertainable standard covering com-

> fort and support which may be either *express or implied,* and (2) the probability of invasion is remote or the extent of the invasion is calculable in accordance with some ascertainable standard." (Emphasis added).

In *Ithaca Trust Company, supra,* the Supreme Court, at page 154, sustained the right to the deduction saying: "The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion."

As stated in *Mercantile-Safe Deposit and Trust Co. v. United States,* 252 Fed. Supp. 191:

> "Following the Ithaca Trust decision, the courts have held that the standard is sufficiently definite where the will permits invasion for the beneficiary's 'comfort and welfare'. Blodget v. Delaney, 1 Cir., 201 F.2d 589 (1953), 'proper care, support and maintenance', Lincoln Rochester Trust Co. v. Commissioner, 2 Cir., 181 F.2d 424 (1950), 'support and maintenance', Berry v. Kuhl, 7 Cir., 174 F.2d 565 (1949), 'to meet any unusual demands, emergencies, requirements or expenses for her personal needs that may arise from time to time', Lincoln Rochester Trust Co. v. McGowan, 217 F. 2d 287, 289 (1957), or for 'the upkeep of the homeplace and all necessary medical and hospital expenses in the case of the illness' of either or both of the testator's sisters, Bowers v. South Carolina National Bank of Greenville, 4 Cir., 228 F. 2d 4 (1955). Granting the trustee discretion

> with respect to the amount to be used for the specified purpose is not fatal. Neither is omission from the will of specific reference to the support or comfort 'then enjoyed'."

Although the trust created by Ludwig Erb did not specifically limit the invasion power to support, etc., in the manner which Emma had previously enjoyed, as was the case in *Ithaca,* it did limit such invasion to moneys necessary for her "reasonable" support, care, comfort, etc .In addition it is conceded that the trustor and trustee intended that the power to invade should be so limited.

In *Commissioner v. Robertson's Estate,* 141 F. 2d 855 (4th Cir., 1944), invasion was authorized "if the best interests of my sister should so require". In the trustee's judgment her best interests required her to be maintained according to her standard of living of the past ten or fifteen years. Judgment for the taxpayer was affirmed and the court noted, at page 857, the Tax Court's finding of fact, to wit:

> "We think it clear, therefore, from the evidence that any uncertainty in the bequests to the charities by reason of the prior authority of the trustee to distribute principal if in his judgment the best interests of the beneficiary should require was negligible. The possibility that the charitable bequests would fail or be diminished was so remote as to be nil."

In *Lincoln Rochester Trust Co. v. Commissioner,* 181 F. 2d 424 (2nd Cir., 1959), invasion was permitted for the beneficiary's "proper care, support and maintenance". The court held that this meant such as

is "suitable or appropriate to the station in life to which she was accustomed" and admitted that interpretation was to be controlled by state (New York) law.

In *Blodgett v. Delaney, supra,* "comfort and welfare" was held to mean, under Massachusetts law, support in accordance with the beneficiary's station in life and accustomed pattern of living. The Treasury Department would do well to heed the following paragraph, appearing at page 594 of the opinion:

> "Many other Courts of Appeals on like reasoning, and also taking into consideration the clear Congressional policy not to benefit the national revenue at the expense of charitable institutions, have in comparable factual situations reached the conclusion of deductibility."

Other cases in which the courts have implied a limitation of the power to invade to instances where it is necessary to render support in a degree to which the beneficiary is accustomed even though no such express limitation is set forth in the will are *Lincoln Rochester Trust Co. v. McGowan,* 217 F. 2d 287; *United States v. Powell,* 307 F. 2d 821; and *Estate of Mary Cotton Wood,* 39 T.C. 919.

The power of invasion in Ludwig's trust, considered in light of the law of the State of California, provides a definite standard limiting the extent of possible invasion for the benefit of the life beneficiary. It has been additionally shown herein that local law enforces such a standard.

Conclusion.

The practical question before the Court is whether the government and the District Court may arbitrarily maintain that no ascertainable standard governs the trustee's power of invasion of the corpus by focusing solely on the phrase ". . . or for any purpose whatsoever, whether included in the foregoing classification or not." This view ignores the mandates of logic, of local law (both in regard to interpretation of instruments and duties of a trustee) and of past decisions of the United States Supreme Court, the Tax Court and the Ninth Circuit Court of Appeals. The ascertainable standard of both the life interest and of the remainder interest is calculable as of the date of Ludwig Erb's death as is required by the Treasury Regulations governing Section 2055 of the Internal Revenue Code of 1954. The life interest is to be measured by the standard of living enjoyed by Emma Erb prior to Ludwig's death. From the facts conceded by the government to be true, the possibility that the charitable transfer will not become effective is so remote as to be negligible. The occurrence of an event which would defeat the interest vested in the charitable remaindermen is not only highly improbable at the time of Ludwig's death, but presently is impossible.

Although after Emma's death on August 31, 1962, there were distributions of corpus, and the trust continues for the benefit of succeeding life beneficiaries, these life beneficiaries are to receive income only and the trustee no longer has the power to invade the cor-

pus for their benefit. Thus the entire trust corpus will be distributed to the following charities, in equal shares:

Goodwill Industries of Southern California,
Hathaway Home for Children,
McKinley Home for Boys,
Braille Institute of America, Inc.,
Salvation Army of California,
Pacific Home.

The court is, of course, aware that an affirmance of the erroneous decision of the trial court will, taking into account interest on the overpayment, deprive each of said charities of a sum in the neighborhood of $17,000.00.

It would seem particularly appropriate, at this point, to quote from the dissenting opinion of Judge Hutcheson of the Fifth Circuit in *National Bank of Commerce of San Antonio v. Scofield,* 169 F. 2d 145, at page 148:

> "Covetousness, rapacity, and greed are as unvirtuous and unlovely in a governmental bureau as they are in the citizen, and courts should be as quick to call them what they are in the one case as in the other."

The decision of the District Court in granting the Government's Motion for Summary Judgment should be reversed, and the Court below directed to enter that:

1. The plaintiff is entitled to recovery of Federal estate tax upon its claim that it was entitled to deduct from decedent's gross estate $297,562.71 as a deduction for charitable bequests under Section 2055 of the Internal Revenue Code of 1954 (26 U.S.C. §2055), and

2. The Court retains jurisdiction of this action for the purpose of determining the amount of any deduction for Federal estate tax purposes to which the plaintiff is entitled for attorney's fees and expenses incurred in connection with contesting the deficiency assessed and prosecuting the claim for refund in this action, including any appeal from this Judgment, upon proof there of to the Court.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

HENRY G. BODKIN, JR.